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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 793

DETROIT, TOLEDO AND IRONTON RAILROAD COMPANY,

Petitioner,

vs.

DIANE LONES, a minor, by her father and next friend, HOMER J. LONES and METROPOLITAN LIFE INSURANCE COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI To The United States Court of Appeals, For The Sixth Circuit.

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Respondents.

PETITION FOR WRIT OF CERTIORARI To The United States Court of Appeals, For The Sixth Circuit.

OPINION BY COURT BELOW.

Petitioner, Detroit, Toledo & Ironton Railroad Company, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the judgment rendered, by a divided court, in case No. 17912 entitled *Diane Lones, a minor, et al., Plaintiffs-Appellees v. Detroit, Toledo & Ironton Railroad Company, Defendant-Appellant,* and the order of that Court denying Petitioner's Petition For Rehearing entered October 4, 1968, Chief Judge Weick again dissenting.

The opinion of the Court is reported in 398 F.2d 914. The official opinion of the majority of that Court and the dissent of Chief Judge Weick are included herein as Appendix A to this Petition.

JURISDICTION OF THIS COURT.

The judgment sought to be reviewed was entered July 31, 1968. (Appendix B.) Thereafter, petitioner filed its Petition For Rehearing And Suggestion Thereof En Banc which was denied October 4, 1968, Chief Judge Weick dissenting. (Appendix C.) The Court of Appeals for the Sixth Circuit stayed its mandate to and including November 30, 1968, to permit the filing of this Petition. (Appendix D.)

Jurisdiction of this Court to review the judgment is conferred by Title 28, U.S.C., Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

I.

Is a state standard or federal standard applicable to determine the sufficiency of the evidence to support a jury verdict in federal court where jurisdiction is based on diversity of citizenship?

II.

Is the standard in Federal Employers' Liability Act cases the applicable standard for determining the sufficiency of the evidence to support a jury verdict in common law negligence cases in the federal courts?

III.

Should this Court exercise its power of supervision over lower courts which decide important state questions in conflict with applicable state law?

STATUTES INVOLVED.

Two statutes of the State of Ohio are pertinent to the issues raised in this appeal. They are Ohio Revised Code Sections 4501.01(A) and 4511.62. (Appendix E.)

STATEMENT OF THE CASE.

A. Nature and Status of the Case.

This is a common law negligence diversity action for the recovery of damages arising out of personal injuries sustained by a minor girl, fifteen years and ten months of age, in a grade crossing accident which occurred in Uniopolis, Auglaize County, Ohio, on October 2, 1960, when the girl rode her bicycle through operating flashers and onto a two-track crossing during switching operations and was struck by a moving cut of railroad cars. In the United States District Court for the Northern District of Ohio, Western Division, the issues were submitted to the jury, over the objection of Petitioner, and Respondents recovered a Judgment on the jury verdict in the amount of One Hundred Eleven Thousand Nine Hundred Dollars ($111,900.00) The trial court denied Petitioner's post-trial motions for a new trial and for judgment notwithstanding the verdict.

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit where, in a widely split decision, the judgment was affirmed. The majority held that all issues were properly submitted to the jury under the Federal Employers Liability Act standard for determining the sufficiency of the evidence to take the case to the jury. The dissent, following Ohio law and precedents of the Sixth Circuit construing it, maintained that Respondents could not recover under Ohio law and, therefore, should not recover in the federal court.

B. The Parties Below.

While there were, in fact, three plaintiffs in the courts below (the minor girl, her father, and a subrogated insurance carrier), the principal plaintiff was the injured

girl, Diane Lones. For the convenience of this Court, therefore, the parties are referred to herein as "Petitioner" or "railroad" and "Respondent" or "minor girl."

C. Proceedings in the Courts Below.

The action was originally filed in the Court of Common Pleas of Auglaize County, Ohio, and was thereafter removed by the railroad to the United States District Court for the Northern District of Ohio, Western Division, where it was tried to a jury.

An amended Complaint simply charged the railroad with negligence. The railroad answered, denying negligence on its part and affirmatively charging contributory negligence and assumption of risk, under Ohio law, on the part of the minor girl in violating operating flasher signals at the crossing and in stopping between the two sets of tracks (main track and elevator siding track) when the engines were stopped on the main track blocking the crossing.

At the end of all the evidence, the railroad moved for a directed verdict in its favor on the ground that the girl was, under Ohio law, guilty of contributory negligence and assumption of risk as a matter of law. The District Court overruled the motion and submitted the case to the jury on all the issues presented, refusing to give the jury correct instructions on certain facets of Ohio law and giving it erroneous instructions on others. As previously seen, a majority of the panel reviewing the case in the Court of Appeals found no prejudicial error in the trial of the case.

D. The Facts.

On October 2, 1960, Uniopolis was a small rural community located in Auglaize County, Ohio. (R. 44-47.) The north-south line of the Detroit, Toledo & Ironton Railroad

Company passed through the center of Uniopolis, intersecting at approximately 90° State Route 67, the main road through the town. (R. 302, 303.) There were two sets of parallel tracks at the crossing: (1) the main track extending north and south, and (2) a side track or elevator track located approximately twenty feet east of the main track which serviced a grain elevator located in the northeast quadrant of the crossing intersection. (R. 302, 303.) The crossing was guarded on both sides of the double tracks by automatic red flasher light signals and bells. On the signal standard were the words "railroad crossing," "two tracks," and "stop on red signal." (R. 324, 325.)

Route 67 extended in a general easterly and westerly direction and was a paved highway approximately twenty feet wide. (R. 302, 303.) At the crossing, it expanded to 29 feet in width. (R. 50, 51.) The distance between the innermost rails of the main track and the elevator track was approximately 19 feet. (R. 302.) The tracks and the highway were straight and level in the area of the crossing. (R. 308-310.) At a point approximately 430 feet south of the crossing, the elevator track joined the main track by means of an S-shaped cross-over track and train movements at the cross-over were controlled by a switch at that location. (R. 305.) The views along the tracks for travelers on the highway were clear and unobstructed. (R. 325, 326.)

The accident in question occurred on a clear, sunny Sunday afternoon in October. (R. 647.) Petitioner's train was making a regularly scheduled northbound run between Springfield, Ohio and Flat Rock, Michigan, stopping along the way to drop off cars and take on others. (R. 190-192.) One of such switching operations occurred at the grain elevator adjacent to the Uniopolis crossing, where three railroad cars were "dropped" into the elevator

track for spotting at the elevator adjacent to the crossing. (R. 202.)

In the performance of this switching movement, the cut of three cars was dropped into the elevator track at the cross-over switch south of the crossing and allowed to roll slowly in the northerly direction toward the grain elevator. (R. 205-228.) A brakeman rode the rear of the cut of cars to stop it at the elevator. (R. 583-585.) After the cut was dropped, the double-diesel power units (engines) continued on the main track and proceeded north to block the highway crossing. (R. 276, 464, 465.) The engines stopped on the crossing well before the cut of slow moving cars arrived at the crossing. (R. 277-281.) In addition, the automatic flasher signals guarding the crossing were operating at all times. (R. 37, 38, 609.) This was, in all respects, the standard switching procedure followed at the Uniopolis crossing in spotting cars at the elevator. (R. 162.)

At the time of the accident, Diana Lones was a girl fifteen years and ten months of age. (R. 641, 642.) She was a junior in high school. She was a good student, getting "A" and "B" grades and ranking 20th in a class of 98. (R. 754, 755.) She had lived all her life in Uniopolis, residing with her family in their home about 2½ blocks from the crossing. (R. 642, 643.) She had been riding bicycles since she was 7 or 8 years of age (R. 644) and was permitted by her parents to ride on Route 67 and to cross the railroad tracks. (R. 702, 703.) She had ridden her bike over the crossing for 3 or 4 years prior to the accident. (R. 704.) During her formal education, as well as her training at home, she had been schooled in traffic safety. (R. 701, 702.)

Earlier on the day of October 2, 1960, Diane Lones and a girl-friend had ridden back and forth over the

crossing on several occasions. (R. 647-651.) Diane was very familiar with the crossing. The flashers had always been there and she was fully aware of their meaning and purpose. She had previously seen trains operating on the elevator track, as well as the main track. She had been stopped previously by trains at the crossing. She previously had seen switching movements over the crossing and into the grain elevator. Her entire testimony clearly demonstrated that she could not have had any greater knowledge, understanding and appreciation of her duties at the crossing if she had been a mature adult. (R. 645, 646, 705-709, 748.)

Shortly before the accident, Diane Lones and her girlfriend crossed the tracks on their bicycles going in an easterly direction. (R. 650, 651.) The flashers were operating at the time because the train crew was performing switching maneuvers south of the crossing. (R. 650.) The girls stopped several hundred feet east of the crossing to visit with another friend. (R. 723, 724.) Diane left them and rode her bike in the driveway of the grain elevator in the northeast quadrant of the crossing intersection. (R. 652, 726.) She then drove into the highway and headed toward the crossing. (R. 652, 653, 726.) The flashers were operating and she observed them. (R. 652.) As she entered or was about to enter the crossing, the engines approached from the south on the main track and stopped on the crossing. (R. 657, 727-730.) Nevertheless, Diane violated the flasher lights and rode onto the crossing and stopped between the sets of tracks, straddling her bike. (R. 657-659, 739, 748, 749.) Before entering the crossing, she admittedly did not look along the tracks for approaching trains or cars, although she knew that she could have and should have done so. (R. 727, 748.) She also admitted that she had done so on

previous occasions. (R. 705, 706.) As she violated the flashers and entered the crossing, the cut of cars on the elevator track was approaching only a few hundred feet to her left. (R. 279, 280.)

When she went onto the crossing, she knew it was impossible to complete the crossing because of the position of the engines stopped on the crossing. (R. 729, 730.) While on the crossing between the sets of tracks, she admittedly failed to look to the south along the tracks for other railroad traffic which might be approaching. (R. 727, 752.)

The plaintiff's position on the crossing was not observed by any member of the train crew until seconds before the accident, just as the cut of cars was about to enter the road crossing. (R. 277-283, 287, 451, 452, 479.) Her school friends, however, had seen her on the crossing and attempted to call warnings to her. (R. 783, 818.) They said that if she had remained in her stopped position between the tracks, the accident would not have happened. (R. 833.) However, one of them testified that Diane backed up about 2 or 3 steps so that the rear of her bicycle was struck by the cut of cars proceeding over the crossing on the elevator track. (R. 818-820.) She lost a leg at the knee as the result of the accident.

ARGUMENT.

I. Is a state standard or federal standard applicable to determine the sufficiency of the evidence to support a jury verdict in federal court where jurisdiction is based on diversity of citizenship?

On at least two occasions within the last decade, this Court has demonstrated its profound interest in this question, *Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959); *Mercer v. Theriot*, 377 U.S. 152 (1964), but in each instance did not have occasion specifically to decide it. The instant case, however, presents a gross departure, not only from the state standard, but also from the federal standard in the Sixth Circuit. Thus, the question is no longer "lurking in this case" (*Dick, supra*, at p. 444). It is squarely presented and is ripe for resolution.

The real need for a clear precedent on this question is demonstrated by the sharp conflict among the United States Courts of Appeals throughout the land. *Davis Frozen Foods, Inc. v. Norfolk Southern Ry. Co.*, 204 F.2d 839 (4th Cir. 1953); *Planters Manufacturing Company v. Protection Mutual Insurance Company*, 380 F.2d 869 (5th Cir. 1967); *Smith v. Buck*, 245 F.2d 348 (9th Cir. 1957); *Basham v. City Bus Company*, 219 F.2d 547 (10th Cir. 1955); *Lovas v. General Motors Corp.*, 212 F.2d 805 (6th Cir. 1954); *Continental Can Company v. Horton*, 250 F.2d 637 (8th Cir. 1957); *Reynolds v. Pegler*, 223 F.2d 429, 434 (2d Cir. 1955); *Woods v. National Life and Accident Insurance Company*, 347 F.2d 760 (3d Cir. 1965); *Presser Royalty Company v. Chase Manhattan Bank*, 272 F.2d 838 (2d Cir. 1959); *McDermott v. John Hancock Mutual Life Insurance Co.*, 255 F.2d 562 (3d Cir. 1958).

This conflict among the circuits can be expected to continue and to result in an unnecessary multiplicity of ap-

pellate litigation, until the question is resolved in this Court.

Prior to the decision of the majority of the panel in the instant case, the Court of Appeals for the Sixth Circuit adopted the state standard as defined in the Ohio decisions and was strict in its application of that standard. *Lovas v. General Motors Corp.*, 212 F.2d 805 (1954); *Gilbreath v. Southern Railway Company*, 323 F.2d 158 (1963); *Dean v. Southern Railway Company*, 327 F.2d 957 (1964); *Domany v. Otis Elevator Co.*, 369 F.2d 604 (1966).

In *Lovas*, the Sixth Circuit not only applied the Ohio standard but recognized that *substantial evidence* was necessary to meet it and that a *mere scintilla of evidence* is insufficient to require the submission of the issue to a jury. The Court said at page 807 of its opinion:

> "Whether the evidence on behalf of a plaintiff is sufficient to take the case to the jury is a question of law for the trial judge. Where federal jurisdiction is based upon diversity of citizenship, as in the present case, the state law on the question is applicable. (Citations omitted.)
>
> "Certain principles are well settled under both state and federal law. In every case, before the evidence is left to the jury, there is a preliminary question for the judge whether there is any *substantial evidence* upon which a jury can properly proceed to find a verdict for the plaintiff, upon whom the burden of proof is imposed. *A mere scintilla of evidence*, or evidence of no probative value, is not enough to require the submission of an issue to the jury." (Emphasis added.)

The Ohio standard is clear and unambiguous. *Durham v. The Warner Elevator Mfg. Co.*, 166 Ohio St. 31, 139 N.E.2d 10 (1956); *Ayers v. Woodard*, 166 Ohio St. 138, 140 N.E.2d 401 (1957); *Botto v. Fishchesser*, 174

Ohio St. 322, 189 N.E.2d 127 (1963); *Kellerman v. J. S. Durig Co.*, 176 Ohio St. 320, 199 N.E.2d 562 (1964); *Hamden Lodge v. Ohio Fuel Gas Co.*, 127 Ohio St. 469, 189 N.E. 246 (1934).

It is established beyond cavil by the decisions in *Durham, Botto* and *Hamden Lodge*, that the Ohio standard requires "substantial evidence" or "evidence of a substantial nature" before a case may be submitted to the jury, and that a mere scintilla (any evidence, however slight, tending to support each material issue) is not sufficient to satisfy the Ohio standard.

Notwithstanding the clarity of the precedent, both in Ohio and in the Sixth Circuit, the majority of the panel deciding the instant case "reached out" (although denying so) to embrace a standard not heretofore applied in either of those jurisdictions, a device patently necessary to arrive at the result obtained. It is the standard defined by this Court in *Lavender v. Kurn*, 327 U.S. 645 (1946), which clarified the means for testing the sufficiency of the evidence in Federal Employers Liability Act cases. It is vigorously contended by Petitioner, however, that *Lavender* was intended to be limited in its application to FELA cases and that its standard was not to be applied generally to common law negligence diversity cases pending in the federal courts. This Court should now so state.

II. Is the standard in Federal Employers Liability Act cases the applicable standard for determining the sufficiency of the evidence to support a jury verdict in common law negligence cases in the federal courts?

Presumably the Federal Employers Liability Act was promulgated for the purpose of providing a broader legal basis for compensation to an injured railroad employee, not otherwise covered by state workman's compensation

laws, than was provided under the classic common law negligence theory of liability. This Court, in implementing that purpose, stated at page 653 of the opinion in *Lavender v. Kurn:*

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing that seems to them to be the most reasonable inference. *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion.* And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (Emphasis added.)

This test is nothing more than the *scintilla* rule which has long since been rejected in most jurisdictions throughout the land, and certainly in Ohio. 65A C.J.S., *Negligence* § 253 (1966).

Ohio's rejection of it was accomplished in the landmark decision of *Hamden Lodge v. Ohio Fuel Gas Company,* 127 Ohio St. 469, 189 N.E. 246 (1934). The law of the case is summarized in paragraph 2 of the syllabus preceding the opinion of the court:

> "2. The so-called 'scintilla rule,' requiring a trial judge to submit a case to the jury if there is any evidence, however slight, tending to support each material issue, no longer obtains in Ohio. (Second and third paragraphs of the syllabus in *Ellis & Morton v. Ohio Life Insurance & Trust Co.,* 4 Ohio St., 628, and

the case of *Clark v. McFarland,* 99 Ohio St., 100, overruled.)"

When the Ohio test is compared with the FELA test stated by this Court in *Lavender v. Kurn,* the very major differences become immediately apparent. The *Lavender* rule requires a case to be submitted to the jury when there is merely "an evidentiary basis" for the jury's verdict and permits a verdict by direction of the court only where there is "a complete absence of probative facts" to support the jury verdict. In Ohio, however, as well as under the federal standard as heretofore applied in the Sixth Circuit, a mere "evidentiary basis" is insufficient to take a common law negligence action to the jury.

In other words, in an FELA case, "any evidence, however slight, tending to support each material issue," would satisfy the "probative facts" requirements of *Lavender v. Kurn,* but the identical evidence, in a common law negligence action in either Ohio or the Sixth Circuit, would constitute a mere *scintilla* and would be insufficient to meet the test. As the Sixth Circuit said at page 807 of its opinion in *Lovas v. General Motors Corp.:*

> "Certain principles are well settled under both state and federal law. In every case, before the evidence is left to the jury, there is a preliminary question for the judge whether there is any substantial evidence upon which a jury can properly proceed to find a verdict for the plaintiff, upon whom the burden of proof is imposed. A mere scintilla of evidence, or evidence of no probative value, is not enough to require the submission of an issue to the jury." 212 F.2d 805.

If this Court should now decide that a uniform federal standard should be established to test the sufficiency of the evidence to take a case to the jury in common law negligence diversity actions, then this Petitioner submits

that such standard should not be the unique standard applicable in FELA cases. Rather, it should be a standard which embodies the well-established principles of common law negligence as they have evolved from the classic decisions of the highest state courts in the land.

III. Should this Court exercise its power of supervision over lower courts which decide important state questions in conflict with applicable state law?

Rule 19 of this Court suggests that a clear and aggravated departure by a Court of Appeals from the applicable state law will not be countenanced. In the instant case, the majority's preoccupation with the federal vs. state standard question caused it to decide at least three important state questions in a way in conflict with well-established Ohio law.

First, it erroneously concluded that "in Ohio violation of a statute by a child is not negligence per se." (App. A, p. 5). This conclusion is quite wrong. *Central Transfer & Storage Company v. Frost,* 20 Ohio L. Abs. 592, 36 N.E.2d 494 (App. 1935); *Karr v. McNeil,* 92 Ohio App. 458, 110 N.E.2d 714 (1952); *Carano v. Cardina,* 115 Ohio App. 30, 184 N.E.2d 430 (1961).

Second, it erroneously concluded that "negligence of a child is always a fact question." (App. A, p. 5.) This conclusion is quite wrong. *The Cleveland Terminal R.R. Co. v. Heiman,* 16 Ohio C.C.R. 487 (1898); *CCC & St. Louis Ry. Co. v. Gahan,* 1 Ohio C.C.R. (n.s.) 205 (1902); *Scherer v. Wood,* 19 Ohio App. 381 (1924); *Bailey v. Erie R. Co.,* 143 F. Supp. 35 (DCNO 1956).

Third, it erroneously concluded that, under Ohio law, the judicial admissions of a party do *not* establish the fact so as to make the question of that party's negligence one

of law for the court. (App. A, p. 1.) This is quite wrong. *Winkler v. City of Columbus*, 149 Ohio St. 39, 77 N.E.2d 461 (1948).

In *Winkler*, the plaintiff testified one way on direct examination and to the contrary on cross-examination with respect to his own contributory negligence. The Supreme Court of Ohio held that the conflicting testimony of a party does not make a question of fact for the jury, but that his judicial admissions establish the fact and are binding upon him as a matter of law.

In deciding these fundamental questions of Ohio law in a manner directly in conflict with existing Ohio precedents, the majority in the instant case wrongfully invaded the province of the Ohio courts. The confusion as to the Ohio law which this decision will now create is immediately evident in many of the twenty-six headnotes preceding the report of the case in 398 F.2d 914.

Chief Judge Weick's real concern over the majority's complete departure from well-established state law is expressed twice in his dissenting opinion:

> "In such a situation it is unprecedented to claim the benefit of the salutary doctrine of last clear chance." (App. A, p. 22.)
>
> * * * * *
>
> "Under Ohio law, plaintiff cannot recover. She ought not to recover in the Federal court." (App. A, p. 25.)

CONCLUSION.

It is submitted that a writ of certiorari should issue so that this Court may decide the extremely important questions raised by the lower federal courts' decisions in this case. Issuance of the writ will enable this Court to resolve the conflict among the United States Courts of

Appeals with respect to the proper standard to be applied in testing the sufficiency of the evidence in common law negligence diversity actions. It will also permit this Court to exercise its supervisory power and duty to prevent the lower federal courts from departing from clear and settled principles of state law in such actions.

These questions are of fundamental significance, and, when presented together in one case, provide a compelling basis for the exercise of this Court's jurisdiction. The Petition for a Writ of Certiorari should be allowed.

Respectfully submitted,

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APPENDIX A.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Decided July 31, 1968.

Before: WEICK, Chief Judge, CELEBREZZE and PECK, Circuit Judges.

CELEBREZZE, Circuit Judge. Plaintiffs-Appellees brought this suit originally in the Court of Common Pleas of Allen County, Ohio, to recover for injuries sustained by the minor Plaintiff as the result of a railroad crossing accident. On a motion by the Defendant-Appellant, the case was removed to the United States District Court for the Northern District of Ohio, which entered judgment on a jury verdict for the Plaintiffs. Defendant-Appellant has appealed that judgment alleging numerous grounds for error. We find no reversible error in the proceedings below, however, and affirm the judgment of the District Court.

The accident occurred in Uniopolis, Ohio, at a two-track grade crossing, consisting of a main track and an elevator sidetrack spaced about eighteen feet apart. The railroad track ran north and south, intersecting with the east-west Highway 67. On the day of the accident, as the result of a crew working at a grain elevator area near the crossing, the crossing signal had been activated for 20-25 minutes prior to the accident. Diane Lones, the minor Plaintiff, 15 years 10 months of age, and a friend, Melanie Golden, had been riding their bicycles in the area during the time that the crew was working near the crossing and had passed over the grade crossing against the signal at least one time before the accident. Some of the train crew had seen the children playing at or near the crossing.

Just before the accident Diane and Melanie met Jimmie Evans, and the three were playing in an elevator area east of the grade crossing when Diane decided to ride over to the crossing. As she approached the crossing the train crew was in the process of making a "flying switch": a maneuver by which cars at the end of the train are switched onto the sidetrack with sufficient momentum to permit coupling with other cars on the sidetrack. In this case the train was traveling from south to north. The evidence is in conflict whether the train engines were approaching the crossing, on the crossing, or just past the crossing when Diane rode upon the sidetrack. At this time a cut of three cars south of the crossing was floating freely down the sidetrack as a result of the flying switch maneuver. One crew member was at the rear of the first car of the cut of cars to brake the cut and otherwise to control the coupling of the cut with other cars north of the crossing. This crew member's view of the track in front of the cut was severely restricted; he could see only a limited amount of the track even by leaning out to the side of the cut.

Evidence is in conflict whether Diane stopped her bike on the sidetrack or between the two tracks. Likewise, evidence is conflicting whether the engineer or other crew members saw Diane on the crossing as the train approached the crossing, when the train came onto the crossing, or after the train was on the crossing. In any case, as a result of the noise of the diesel engines in front of her Diane did not hear the cut of cars coming down the sidetrack and became aware of the danger only from the shouted warnings of either her friends, who had also come down near the crossing, or the members of the train crew. In response to the warnings Diane either stepped backward slightly or turned to look over her

shoulder, but she saw the danger too late to avoid being struck by the cut of cars.

This brief factual outline will be sufficient to deal with the objections raised by the Defendant-Appellant; for due to the nature of the objections raised only the evidence most favorable to the Plaintiffs can properly be considered by this Court.

In this case, as in any diversity action, in considering each issue raised by the Defendant-Appellant we must first answer the threshold question as to what body of law the Court must look to ascertain the standard to be applied in resolving that particular issue. The doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), is not all-pervasive; where the doctrine begins usually presents no problem, but where the emanations of that doctrine cease to affect the proceedings in a federal trial court is a more perplexing determination. *Compare Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), *with Hanna v. Plumer*, 380 U.S. 460 (1965).

Matters that can clearly be labeled substantive, such as the standard to be applied in determining whether the Defendant-Appellant was negligent, are of course, controlled by state law. We do not take it, however, that the Defendant-Appellant seriously contends that under the facts of this case it could not have been found negligent under the law of Ohio. The flasher signals were activated for a period of 20-25 minutes. During that time several crewmen had seen children playing near the crossing, and at least one crewman had seen children passing over the crossing in violation of the flasher signals. In spite of this knowledge, the crew switched a cut of cars onto the sidetrack under the control of a crewman whose view of the track was severely restricted. No special precautions were taken; no flagman protected the crossing; and from their

testimony, apparently the crew did not even bother to keep a special lookout for children. The engine blocking the crossing might prevent automobile drivers from coming onto the crossing, but it would have no effect on the danger to children that the crew knew, or should have known, existed at that time. In Ohio the care to be observed in avoiding injury to children is greater than the care required to avoid injuring adults. *Cleveland Rolling Mill Company v. Corrigan,* 46 Ohio St. 283, 20 N.E. 466 (1889); *Maumee Valley Railway & Light Co. v. Hanaway,* 7 Ohio App. 99 (1915).

On the other hand, the Defendant-Appellant does strongly urge that the issue of the minor Plaintiff's contributory negligence should have been taken from the jury.[1] This contention is based on alternative grounds; (1) that violation of the flasher signal was negligence as a matter of law, or (2) that under the evidence presented the only conclusion the jury could reach was that the minor Plaintiff was negligent. If either ground is correct, it would have been reversible error for the District Court to fail to instruct the issue of contributory negligence out of the case. *Moore v. Smith,* 343 F.2d 206 (3rd Cir. 1965). We find, however, that the minor Plaintiff was not negligent *per se* under Ohio law and that sufficient evidence was presented under both the federal standard and the Ohio standard to take the issue of contributory negligence to the jury.

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[1] Defendant-Appellant presented the issue of the minor Plaintiff's contributory negligence in three different questions: the first question concerned the District Court's failure to grant a directed verdict, the second the Court's failure to grant a judgment notwithstanding the verdict, and the third concerned the Court's failure to charge the jury that the minor Plaintiff was guilty of contributory negligence as a matter of law. We consider all three questions as presenting essentially the same argument.

Resolution of the question raised by the first ground is clearly controlled by Ohio Law. As indicated earlier, statutes or case law that make specific acts or omissions negligence are regulations of primary activity that are substantive under the *Erie* doctrine and thus must be followed by the federal courts in diversity actions. See *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring). Ohio Revised Code § 4511.62 (Page 1965) provides that no one shall drive a vehicle, which includes a bicycle, over a railroad grade crossing when a clearly visible electric signal is operating. No one contests that the minor Plaintiff violated this statute, but in Ohio violation of a statute by a child is not negligence *per se*. *Michalsky v. Gaertner*, 53 Ohio App. 341, 5 N.E.2d 181 (1935). Whether the violation is negligence depends upon the mental capacity and experience of the child and upon the circumstances of the particular case. *Wheaton v. Conkle*, 57 Ohio App. 373, 14 N.E.2d 363 (1937).

These cases make it clear that the negligence of a child is always a fact question; therefore, the Defendant-Appellant's alternate ground for taking the issue of contributory negligence from the jury must be resolved. Determining whether the evidence in this case was sufficient to go to the jury, however, raises a collateral issue, whether the applicable standard is the federal standard or the state standard, on which there is a considerable conflict of opinion in the Circuits.[2] Our early cases, *O'Donnell*

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[2] The federal standard is applied in the Fourth, Fifth, Ninth and Tenth Circuits: *Davis Frozen Foods, Inc. v. Norfolk Southern Ry. Co.*, 204 F.2d 839 (4th Cir. 1953); *Planters Manufacturing Company v. Protection Mutual Insurance Company*, 380 F.2d 869 (5th Cir. 1967); *Smith v. Buck*, 245 F.2d 348 (9th Cir. 1957); *Basham v. City Bus Company*, 219 F.2d 547 (10th Cir. 1955). The Sixth and Eighth Circuits apply the state standard: *Lovas v. General Motors Corp.*, 212 F.2d 805 (6th Cir. 1954); *Continen-*

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v. Geneva Metal Wheel Co., 190 F.2d 59 (6th Cir. 1950); *Lovas v. General Motors Corp.*, 212 F.2d 805 (6th Cir. 1954), holding that the state law applied, were decided at a time when the decisions of the United States Supreme Court indicated that for purposes of diversity jurisdiction a federal court was, "in effect only another court of the State * * *" *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1954); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940). More recent decisions of the Supreme Court indicate that such a broad rule states too much and that "* * * 'outcome-determination' analysis was never intended to service as a talisman." *Hanna v. Plumer*, 380 U.S. 460, 466-7 (1965); *Byrd v. Blue Ridge Cooperative*, 356 U.S. 525 (1958). These recent developments would make a review of our position appropriate, but we will not reach out to decide the issue since it appears that the Ohio standard and the federal standard are the same.[3] *Dicker-*

(Continued from preceding page)

tal Can Company v. Horton, 250 F.2d 637 (8th Cir. 1957). The positions of the Second and Third Circuits is in some doubt: *Compare Reynolds v. Pegler*, 223 F.2d 429, 434 (2d Cir. 1955); and *Woods v. National Life and Accident Insurance Company*, 347 F.2d 760 (3d Cir. 1965); *with Presser Royalty Company v. Chase Manhattan Bank*, 272 F.2d 838 (2d Cir. 1959); *and McDermott v. John Hancock Mutual Life Insurance Co.*, 255 F.2d 562 (3d Cir. 1958). See generally 5 Moore, Federal Practice Par. 50.06 (1967).

[3] Applying the state standard has not been outcome determinative in most of our decisions. In some cases, when we have considered the problem a re-examination of our position was made unnecessary because the state standard and federal standard were the same. *Price v. Firestone Tire and Rubber Company*, 321 F.2d 725 (6th Cir. 1963); *Gilreath v. Southern Railway Company*, 323 F.2d 158 (6th Cir. 1963); *Dean v. Southern Railway Company*, 327 F. 2d 757 (6th Cir. 1964). In others the issue was not presented because the question was whether the plaintiff had proved the *necessary elements* of his case. See *e.g. Hall v. Marshall*, ____ F.2d ____ (6th Cir. 1968). Compare *Safeway Stores v. Fannan*, 308 F.2d 94, 97 (9th Cir. 1962). Only in *Trivette v. New York Life Insurance Co.*, 283 F.2d 441 (6th Cir. 1960), might application of the federal standard have made a difference in the result reached.

son v. Shepard Warner Elevator Co., 287 F.2d 255, 258 (6th Cir. 1961).

The federal standard, as stated in *Lavender v. Kurn*,[4] 327 U.S. 645 (1946), is:

> "Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the Appellate Court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." 327 U.S. at 653.

The Ohio courts phrase the standard in a different manner, stating that the court must construe the evidence and all permissible inferences from the evidence in a light most favorable to the non-moving party and that matters of weight and credibility are not for the court, *Cothey v. Jones-Lemley Trucking Co.*, 176 Ohio St. 342, 199 N.E.2d 582 (1964); but the resulting application of the rule is the same.

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[4] *Lavender v. Kurn* was an F.E.L.A. case, but we have cited F.E.L.A. cases in the past, *e.g. Wilkerson v. McCarthy*, 336 U.S. 53 (1949), as stating the federal rule for sufficiency of the evidence. See *Dickerson v. Shepard Warner Elevator Co.*, 287 F.2d 255 (6th Cir. 1961). The controversy over whether F.E.L.A. cases state the federal standard for sufficiency of the evidence in common law cases was aptly resolved by the Fifth Circuit in *Planters Manufacturing Co. v. Protection Mutual Ins. Co.*, 380 F.2d 869 (5th Cir. 1967).

Considering the evidence on the issue of contributory negligence, and all permissible inferences from the evidence, in a light most favorable to the Plaintiff's we find that reasonable minds could differ on the conclusion to be reached. In a rare case where the evidence shows no unusual situation and no evidence is presented to show the minor plaintiff's lack of appreciation of the danger confronting him, a directed verdict for the defendant is appropriate. *Bailey v. Erie Railroad Company,* 143 F.Supp. 351 (N.D. Ohio 1956). This, however, is not such a case. Here the minor Plaintiff was confronted by a sidetrack and a main track, not two main tracks, which are frequently used simultaneously. The cut of cars was not a train in the usual sense of that term, and it had no horn or whistle, nor even the noise of an engine, to warn of its approach to the crossing. The minor Plaintiff saw the train on the main track, and from the evidence the jury could infer that, given her knowledge and experience, she could reasonably expect no danger from the sidetrack: She was unfamiliar with the switching maneuver employed by the train crew; she had never seen cars moving on both tracks at the same time; and she had seen cars moving on the sidetrack only when being pushed by an engine.

In *Leach v. St. Louis-San Francisco Ry. Co.,* 48 F.2d 722 (6th Cir. 1931), a case decided during the *Swift v. Tyson*[5] era, this Court refused to hold a twelve-year-old boy, who jumped aboard a slowly moving train and was injured, guilty of contributory negligence as a matter of law. Also in our decisions applying Ohio law, we have been reluctant to hold even adults guilty of negligence as a matter of law when they are confronted with unusual situations. See *New York Central Railroad Company v.*

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[5] 14 U.S. (16 Pet.) 166 (1842).

Delich, 252 F.2d 522 (6th Cir. 1958); *Fannin v. Baltimore and Ohio Railroad Company,* 253 F.2d 173 (6th Cir. 1958). With this background in the Circuit in applying both federal and state law and under the circumstances of this case, we find that the issue of contributory negligence was properly submitted to the jury under an accurate instruction of the Ohio law.

Defendant-Appellant further contends, however, that even if the issue of contributory negligence was properly submitted to the jury, it was prejudiced by the District Court's charge to the jury on the doctrine of last clear chance. The asserted error is based on two grounds: (1) that the evidence does not prove the necessary elements for application of the doctrine, or (2) that the charge was inadequate. Whether the giving or failure to give certain instructions is reversible error is clearly controlled by Rule 51, Federal Rules of Civil Procedure, *Hanna v. Plumer,* 380 U.S. 460 (1965) *supra;* but it is equally clear that since the trial judge must "* * * give such explanation or instruction as may be necessary to enable the jury * * * to render a * * * verdict * * *," Rule 49(b), Federal Rules of Civil Procedure, when a state-created right is being asserted, the state law must be looked to for the substance of the instructions. *Lind v. Aetna Casualty and Surety Company,* 374 F.2d 377 (5th Cir. 1967).

Under Ohio law for the doctrine of last clear chance to apply, it must be shown that the defendant became aware of the plaintiff's situation in time to avoid the accident by the exercise of ordinary care. *Peters v. B & F Transfer Co.,* 7 Ohio St. 2d 143, 219 N.E.2d 27 (1966). Also the evidence must show that the plaintiff's negligence did not continue and, concurrently with the defendant's negligence, contribute to the accident. *Columbus Green Cab v. Seip,* ____ Ohio App. ____, 115 N.E.2d 5 (1952);

Brock v. Marlatt, 128 Ohio St. 435, 191 N.E. 703 (1934). It is Defendant-Appellant's contention that the timely discovery of the minor Plaintiff's perilous position by the train crew and the cessation of the minor Plaintiff's contributory negligence, if any negligence was found by the jury, cannot properly be inferred from the evidence in this case. If the Defendant-Appellant is correct, the District Court erroneously submitted the doctrine to the jury, and the Defendant-Appellant would be entitled to a new trial. *McFall v. Tooke,* 308 F.2d 617, 623 (6th Cir. 1962).

Application of the last clear chance doctrine becomes necessary only if it is assumed that the jury found the minor contributorily negligent. That the minor Plaintiff might have been negligent in going onto the crossing does not mean, however, that such negligence continued as long as she remained on the crossing. Under the evidence, the jury could have found that the minor Plaintiff was negligent in riding past the flasher signals but that once she was on the crossing with the train engines in front of her that she had no reason to expect danger from the sidetrack and therefore her original negligence ceased. Further, the jury could have found that remaining on the side track, without taking special precautions, was not negligence considering the minor Plaintiff's age and experience.

In its argument on the "discovered peril" element of the Ohio last clear chance doctrine, the Defendant-Appellant cites several Ohio cases where there was no evidence to support application of the doctrine. *E.g., Farmer v. Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.,* 83 Ohio App. 321, 80 N.E.2d 177 (1947); *Kubick v. Cleveland Ry. Co.,* 7 Ohio Law Abs. 91 (1929). But those cases are of little assistance to us in deciding the instant case where there is evidence to justify application of the doctrine. It must be borne in mind that in determining

whether the evidence was sufficient to present a case for the jury our function is exhausted when an evidentiary basis becomes apparent. *Lavender v. Kurn*, 327 U.S. 645, 647 (1946) *supra.*

Bearing in mind that the jury may discard or disbelieve whatever evidence is inconsistent with its conclusion, we recite that evidence that would show the element of "discovered peril." The investigating highway patrolman testified that one of the engineers said that he saw the minor Plaintiff as the train approached the crossing, and Jimmie Evans testified that as the train approached the crossing he saw one of the engineers wave to the minor Plaintiff. It is immaterial that there were some apparent contradictions from prior statements or that the Defendant-Appellant's engineers denied seeing the minor Plaintiff until the engines were on the crossing. The witnesses' credibility and the weight to be given their testimony were matters for the jury. *Dickerson v. Shepard Warner Elevator Co.*, 287 F.2d 255, 259 (6th Cir. 1961). So it is clear that the jury could conclude that the train crew discovered the minor Plaintiff's perilous position.

On the question of whether the discovery was in time to avoid the accident by the exercise of reasonable care, the jury could conclude from the evidence concerning the relative speeds and positions of the cut and the engines and the length of time that the minor Plaintiff was on the crossing that at the time the engineer discovered the minor Plaintiff's position there was a considerable distance between the cut and the crossing. The engineer was near the whistle, and three short blasts on the whistle would have alerted the crew that some obstruction was on the track. From the testimony of the brakeman in control of the cut of cars the jury could infer that if such a signal had been given he would have looked to the track in front

of the cut of cars and would have had time to stop the cars.[6] So it is also apparent that there was an evidentiary basis on which the jury could consider the doctrine of last clear chance.

Defendant-Appellant's contention that the instructions to the jury on last clear chance were inadequate is based on the assertion that the Court failed to properly instruct on the Plaintiff's continuing negligence. The District Court did charge that the Plaintiff's contributory negligence must cease for the doctrine of last clear chance to apply and, in our view, gave a fair and complete instruction on the applicable law of Ohio. Therefore, the Court's failure to give the Defendant-Appellant's requested special instruction was not error. *Tyree v. New York Central Railroad Company*, 382 F.2d 524 (6th Cir. 1967).

The remaining objections concern the admission or exclusion of evidence, the introduction of the issue of wanton misconduct, and certain alleged jury misconduct. Rule 43a, Federal Rules of Civil Procedure, controls the admission and exclusion of evidence in the federal courts, *Erie R. Co. v. Lade*, 209 F.2d 948 (6th Cir. 1954), and Rule 61 determines whether any error was reversible error. Clearly, under the broad discretion provided by Rule 15(b), F.R.C.P., to amend the pleadings to conform to the evidence, it was not error to allow the introduction of the issue of wanton misconduct even if that issue was not pleaded. The Ohio cases cited by Defendant-Appellant

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[6] The brakeman testified that he could have stopped the cut in one and a half car lengths. Defendant-Appellant attempted to get into evidence the engineer's opinion that the cut could not have been stopped. We think that the District Court properly sustained the Plaintiffs' objection to the question. Even if such evidence was admissible, however, the engineer answered the question, and since the answer was before the jury, the District Court's mere sustaining of the objection would have been harmless error. Rule 61, Federal Rules of Civil Procedure.

are inapposite. We find no error in the District Court's rulings on these points and consider the issue of jury misconduct to be completely without merit.

Affirmed.

WEICK, Chief Judge, dissenting:

The verdict and judgment in the amount of $111,-900.00 ought not to stand because (1) plaintiff was negligent as a matter of law (2) and the trial court erred in submitting the issue of last clear chance to the jury.

Plaintiff's Negligence.

Plaintiff was a girl fifteen years and ten months of age. She was a junior in high school. She was a good student getting "A" and "B" grades and ranking 20th in a class of 93. There was no claim of any physical or mental impairment. She had lived in Uniopolis all of her life. Her home was located only about 2½ blocks from the grade crossing at which the accident occurred. She was "quite familiar" with the crossing. She had ridden a bike since she was seven or eight years old. She had ridden her bike over the crossing for three or four years before the accident. She had received traffic safety instruction both at home and in school. She had seen movements on the main track and the spur track which was also known as the elevator track.

Cross-arm warning signs were located on both sides of the tracks in plain view for approaching traffic. The signs were equipped with automatic red flasher lights and a bell. On the crossbars were written the words "Railroad Crossing." On one sign was written "Two Tracks" and on another "Stop on Red Signal." Plaintiff understood what the signals meant when they started to flash.

The switch was located 429 feet south of the crossing. The highway was paved and was straight. It was 20 feet

wide but, between the main track and the spur track, the pavement was 29 feet wide. The distance between the innermost rails of the main track and spur track was 18½ to 19 feet. The grain elevator where the cars were to be spotted was located adjacent to the crossing on the northeast side of it where the spur track dead-ends.

The view south of the crossing was unobstructed for at least 10 feet east of the crossing. The accident happened on a Sunday afternoon of a clear sunny October day.

In the switching operation, three cars, one loaded and two empties, were cut off the main track and "dropped" into the elevator track. The power units, consisting of three diesel engines, proceeded north on the main track and came to a stop blocking the crossing in order to prevent vehicular traffic from crossing while the cut of cars was being spotted at the grain elevator. The cut of cars proceeded north on the spur track at some distance to the rear of the power units and at about six miles an hour, but the speed of the cut had been reduced by the brakeman to about two miles an hour at the time of the accident. The cars came to a stop about 23 feet 4 inches from the place where the accident took place.

Plaintiff and a girl friend, Melanie, had been riding their bikes that afternoon. Plaintiff left Melanie talking with a boy named Jimmie Evans who had been riding a power mower. Plaintiff approached the crossing on her bike. The signal lights were flashing at the time. She testified on direct examination that she did not remember stopping before she entered the crossing. She said "I don't think I did." On cross-examination she was asked:

> "Q. Well now as you came out of that elevator driveway toward the crossing, did you stop before you went onto the crossing? Did you stop your bike?
>
> "A. Gee—I don't really believe I stopped. I may have slowed down."

She rode her bike over the spur track a distance of of four or five feet west of it. Her testimony on direct examination was:

> "Q. Where did you finally come to a stop?
> "A. Well, I was off the roadway, oh a few feet in front of the elevator track. I—maybe four or five feet after I crossed over the track."

She was not off the roadway but on the extended width of the road between the tracks.

On cross-examination she testified:

> "Q. So then you went up onto the crossing and stopped your bicycle someplace—between the tracks, was it?
> "A. Between the elevator track and the main track, yes."

She further testified that she was closer to the elevator track than to the main track, but she believed she was clear of the elevator track.

She further testified that she remained stopped for thirty seconds or a minute before the accident happened or maybe longer, but she did not think it was any less than thirty seconds.

At the time she stopped, she said the train on the main track was about in the middle of the road and had not come to a stop.

At no time prior to her stopping, or after she stopped, did she look south down the spur track where she could have seen the approaching cars proceeding slowly in plain view. She testified that when the train had stopped she was also stopped and was straddling her bike for about a minute when she heard a shout or yell which she thought was from the cab of the train. She turned her head that way (north) and was then hit.

On cross-examination she testified:

"Q. All right. Did you look in either direction along the elevator track before you went on it?

"A. Well, I could have and it's—it is possible that I really could have looked down there, but I don't remember looking.

"Q. You not only could have, you should have, isn't that correct?

"A. I should have, yes."

When plaintiff had stopped her bike between the tracks, her girl friend, Melanie, followed her to the edge of the crossing and was in the best position to see what happened.

Melanie testified that there was sufficient room between the two sets of tracks for plaintiff's bike and trains to clear; that plaintiff had stopped and was straddling her bike; that the flashers were operating; that if plaintiff had looked to the south she could have seen the approaching cut of cars.

Melanie testified on cross-examination as follows:

"Q. Now, while Diane was standing between the tracks facing west did you see her move her head at all before the accident?

"A. Yes; Jimmie called to her and she looked over her right shoulder at him and backed up.

* * * * *

"Q. How many steps back did she take before the collision occurred?

"A. I don't know; I don't. I would say three.

"Q. At least several steps?

"A. Three, around three, yes.

"Q. All right, so the rear half of the bike was out behind her, is that right?

"A. That's true.

"* * *"

Melanie further testified that if plaintiff had not backed up the cars would have gone past without hitting her. Melanie did not see the cut of cars until they were right on top of plaintiff.

Jimmie was following Melanie on his power mower and talking to her at the same time. He testified that he saw the train entering the crossing and a crewman waving at plaintiff.[1] He did not state where the cut of cars were at the time he claimed the crewman waved. It seemed to Jimmie that plaintiff "might have moved back just a little bit." In describing how quick the accident happened he said "It was awful fast. It seemed like she was there and Boom! And then she wasn't." He further testified "Well, if she had noticed them (box cars) before she went on the crossing she wouldn't have gone on the crossing" and "If she would have noticed the box cars she would have moved forward to clear it too."

Jimmie did not see the cut of cars until they were either on the crossing or a car length away.

Ohio law requires the traveler upon a public highway to look and listen for the approach of trains before proceeding over a grade crossing, and he must look and listen at a place and in a manner that will make the looking and listening effective. One cannot "claim the right to recover simply because he has looked and did not see, if the conditions are such that, had he looked, he must have seen." *Detroit, Toledo & Ironton Rd. Co. v. Rohrs,* 114 Ohio St. 493, 500. We followed this case recently and applied the rule in *Allen, et al. v. New York Central Rd. Co.*, __ F.2d (1968) in which we affirmed an order of the District Court

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[1] Jimmie made no mention of the crewmen waving in a statement he gave to his Legal Officer in the Navy which, except for formal parts, was in his own handwriting. His testimony at the trial conflicted materially with his statement.

granting summary judgment in favor of the Railroad. Other pertinent Ohio cases are: *North v. Pennsylvania Rd. Co.*, 9 Ohio St. 169 (1967) (summary judgment); *Boles v. Railroad Co.*, 168 Ohio St. 551 (1959); *Woodworth v. New York Central Rd. Co.*, 149 Ohio St. 543 (1948); *Patton v. Pennsylvania Rd. Co.*, 136 Ohio St. 159 (1939); *Pennsylvania Rd. Co. v. Rusynik*, 117 Ohio St. 530 (1927); *Toledo Term. Rd. Co. v. Hughes*, 115 Ohio St. 562 (1926); *Railroad Co. v. Kistler*, 66 Ohio St. 326 (1902). Other decisions of our Court are: *Newcomb v. Baltimore & Ohio Railroad Co.*, 352 F.2d 406 (6th Cir. 1965); *Anderer v. Baltimore & Ohio Rd. Co.*, 300 F.2d 14 (6th Cir. 1962); *Carter v. Pennsylvania Rd. Co.*, 172 F.2d 521 (6th Cir. 1949); *Detroit, Toledo and Ironton Rd. Co. v. Yeley*, 165 F.2d 375 (6th Cir. 1947); *Baltimore & Ohio Railroad Co. v. Joseph*, 112 F.2d 518 (6th Cir. 1940); *Cert. den.*, 312 U.S. 682; *rehearing den.* 312 U.S. 714.

In Ohio, a minor is liable for his torts. *Wery v. Seff*, 136 Ohio St. 307 (1940). A minor may be negligent, contributorily negligent, and also assume the risk of his injury as a matter of law. The rule is stated in *Engelhardt v. Phillips*, 136 Ohio St. 73 (1939) where the Court held that a boy between eleven and twelve years of age, who was a fairly good swimmer and diver, assumed the risk of his injury as a matter of law. Judge Hart in writing the opinion of the Court said:

> "While children are not chargeable with the same amount of care as persons of mature years, they are required to exercise ordinary care to avoid injury to themselves, such care as applied to them being that care which children of like age, education, experience, and ordinary prudence are accustomed to exercise under the same or similar circumstances. *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Grambo, Sr., Admr.*, 103 Ohio St. 471, 134 N. E., 648, 20

A. L. R., 1214; *Rolling Mill Co. v. Corrigan,* 46 Ohio St., 283, 290, 20 N. E., 466, 15 Am. St. Rep., 596, 3 L. R. A., 385. It is true, as claimed by plaintiff, that contributory negligence is not an issue in this case, but the doctrine of assumed risk is in the case as applied to the plaintiff, considering his age, education and experience. Where the nature and extent of the risk are fully appreciated and voluntarily incurred, there is assumption of risk. *Hunn v. Windsor Hotel Co.,* 119 W. Va., 215, 193 S. E. 57.

If one is of mature age, or of sufficient age to know and appreciate the danger that attends his act, he cannot complain of an injury sustained by reason of a risk voluntarily assumed. He cannot go into a place of danger which he appreciates and understands, and recover if he is injured thereby. The conduct of a child "is to be judged by the standard of behaviour to be expected from a child of like age, intelligence and experience. A child may be so young as to be manifestly incapable of exercising any of those qualities of attention, intelligence and judgment which are necessary to enable him to perceive a risk and to realize its unreasonable character. On the other hand, it is obvious that a child who has not yet attained his majority may be as capable as an adult of exercising the qualities necessary to the perception of a risk and the realization of its unreasonable character." 2 Restatement of Law of Torts, 743.

Generally speaking, it may be assumed that a person of whatever age is able to appreciate the obvious risks incident to any sport or activity in which he may be able to engage with intelligence and proficiency and must act accordingly. If a child is able to play baseball capably, he must know that there is danger of being hit with ball or bat; if he is able to engage proficiently in the game of football, he must know that in playing the game there will occur violent physical contacts which may result in injury to him;

> if he is a proficient swimmer and diver, he must know of the danger of drowning and the danger of harm incidental to the use of diving apparatus. *Murphy, an infant v. Steeplechase Amusement Co., Inc.*, 250 N. Y., 479, 166 N. E., 173. That the plaintiff in the instant case knew of the condition of the tower platform in question is shown by the fact that he testified fully upon that subject. Since the plaintiff in this case was shown to be a proficient swimmer and diver and had had much experience in the use of the swimming pool and its diving apparatus, can it be said that he was so immature that he could not appreciate the insecurity of standing or walking upon or diving from a platform which was obviously slippery when wet, and that a slip or fall from such platform might result in more or less injury to him? We think the record in this case warrants the conclusion that he had the ability to appreciate this risk. See *Turner v. City of Moberly*, 224 Mo., 683, 26 S. W. (2d), 997; *City of Evansville v. Blue*, 212 Ind., 130, 8 N. E. (2d), 224; *City of Menard v. Coats* (Tex. Civ. App.), 60 S. W. (2d), 831; *Swan v. Riverside Bathing Beach Co.*, 132 Kan., 61, 294 P., 902. * * *"

See also: *C.C.C. & St. L. Ry. Co. v. Bahan*, 1 Ohio C.C. (NS) 205 (1905); *Bailey v. Erie R. Co.*, 143 F. Supp. 351 (D.C.N.O. 1956).

The record in this case establishes that plaintiff was a good student and an experienced bicycle rider who was familiar with the crossing, and had passed over it many times. She was not so immature as not to appreciate the danger of driving over the crossing without looking for the approach of trains, and that her failure to look might result in injury to her. It is clear that she did have the ability to appreciate the danger and to avoid it.

Last Clear Chance

The classic case in Ohio on last clear chance is *Railroad Co. v. Kassen,* 49 Ohio St. 230 (1892). In that case, a passenger on a train fell off the platform of the car in which he had been riding onto the track and was rendered unconscious. The railroad knew of this and did nothing to rescue him before he was struck and killed by another train. It is obvious that the decedent was in a position of peril from which he could not extricate himself, and there was no question but that the defendant knew it. Although he was negligent in falling off the platform, his negligence had ceased when he was rendered unconscious on the ground and could not help himself. The railroad was negligent when it failed to exercise ordinary care after it became aware of his peril.[2]

In *Cleveland Ry. Co. v. Masterson,* 126 Ohio St. 42 (1932), Judge Jones, who wrote the opinion for the Court, said:

> "* * * where the plaintiff and defendant are both negligent and the former's negligence places him in a perilous situation *from which he cannot escape,* the plaintiff may still recover, even though he negligently placed himself in such situation, if the defendant did not exercise ordinary care after discovery of his peril." (Italics mine.)

The rule is stated in *Brock v. Marlatt, Admx.,* 128 Ohio St. 435 (1934) as follows:

> "The last clear chance rule has no application to any situation except where the injured party through

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[2] Later decisions of the Supreme Court of Ohio have limited the doctrine of last clear chance to situations where the defendant *actually* knew and not merely should have known that plaintiff was in a position of peril. *Cleveland Ry. Co. v. Masterson,* 126 Ohio St. 42 (1932); *Pennsylvania Co. v. Hart,* 101 Ohio St. 196; *Peters v. B. F. Transfer Co.,* 7 Ohio St. 2d 143 (1966).

his own negligence has placed himself in a position of peril. The doctrine pre-supposes the antecedent negligence of the plaintiff, and an instruction on such issue is not proper where the negligence of the defendant and contributory negligence of the plaintiff are concurrent. (Cleveland Ry. Co. v. Masterson, 126 Ohio St., 42, and Pennsylvania Co. v. Hart, 101 Ohio St., 196, approved and followed.)"

On page 439, Judge Matthias, who wrote the opinion for the Court, stated:

"The record discloses that the decedent's act in crossing the highway and the approach of the defendant's automobile were concurrent acts, and, if negligent, such negligence continued until they came into collision, which collision some of the evidence indicates occurred at least partly as a result of plaintiff's decedent suddenly reversing his course into the path of the approaching automobile. Without fully reviewing the evidence in the record it is sufficient to say that in so far as the evidence indicated contributory negligence of the plaintiff's decedent it was continuing and concurrent with the acts of the defendant charged to have been negligent. It had not ceased for a sufficient time prior to the accident to enable the defendant, after she knew of the peril of the decedent, to avoid the accident, and hence the rule of the last clear chance has no application and its injection into the case is prejudicially erroneous. *Pennsylvania Co. v. Hart,* 101 Ohio St., 196, 128 N. E., 142."

In *Peters v. B. & F. Transfer Co.*, 7 Ohio St. 2d 143 (1966), the Court held:

"* * *

"6. Where a plaintiff, by his own fault, caused himself to be placed in a perilous situation, he may recover under the rule of the "last clear chance" notwithstanding his negligence, if the defendant did not,

after becoming aware of plaintiff's perilous situation, exercise ordinary care to avoid injuring him. (Paragraph one of the syllabus of Cleveland Ry. Co. v. Masterson, 126 Ohio St. 42, approved and followed.)

"7. For the doctrine of "last clear chance" to be applicable it must be proved that the defendant became aware that plaintiff was in a position of peril *at a time and distance* when, in the exercise of ordinary care, he could have avoided injuring plaintiff. (Italics mine.)

"8. Under our law it is just as pernicious to submit a case to a jury and permit the jury to speculate with the rights of citizens when no question for the jury is involved, as to deny to a citizen his trial by jury when he has the right. (Paragraph six of the syllabus in J. C. Penney Co., Inc. v. Robison, 128 Ohio St., 626, approved and followed.)"

See also: *Drown v. The Northern Ohio Traction Co.*, 76 Ohio St. 234 (1907).

In the case at bar plaintiff's negligence had not ceased. She was not in a position of peril from which she could not have extricated herself before the accident happended. She was negligent in riding her bike over the spur track without looking south where the approaching cut of cars was slowly approaching and in plain view. She was negligent in remaining between the spur track and the main track for a period of from thirty seconds to one minute before the accident happened without looking down the spur track. Had she looked, she could easily have averted the accident either by not moving backward or by taking a few steps forward to a place of safety in the 18½ foot strip between the spur and main tracks. The cut of cars which struck her was travelling at only two miles an hour at the time of the accident. A person could walk faster than the cars were moving. In such a situation

it is unprecedented to claim the benefit of the salutary doctrine of last clear chance.

Jimmie Evans testified that a crewman waved to plaintiff as the power units were proceeding across the highway. He did not testify as to the distance of the cut of cars from the crossing at the time he claimed the engineer waved. The fact is he never looked and did not know.

A state highway patrolman also related a conversation he claimed to have had with the engineer at the scene of the accident, who was alleged to have told him that he waved and shouted a warning to plaintiff either as the train was approaching the crossing or after it had already stopped and was blocking the crossing. This conversation was not in the patrolman's written report or in the engineer's written statement and the patrolman was necessarily testifying from memory, which probably accounts for his vagueness in attempting to remember what was said six years ago. The conversation does not enlighten us as to the distance of the cut of cars from the crossing at the time.

Plaintiff argues from this testimony that the cut of cars could have been stopped by the brakeman in time to have avoided the accident if the engineer had given appropriate signals. The brakeman who was riding on the cut of cars never saw the plaintiff on the crossing. The engineer was not on the cut of cars but was on one of the power units on the main track. He testified that after the power units came to a stop he looked south down the elevator tracks and observed the cut of cars approaching, but at that time no one was within the crossing and it was clear. He later looked down a second time and saw the cut of cars "practically right on top of her." He yelled and waved to her and saw her turn to the right and back up and the cars then struck her.

It is claimed that instead of shouting and waving the engineer should have blown the whistle on the train to signal the brakeman on the cut of cars that someone was on the elevator tracks so that the brakeman could apply the brakes and stop the cars. But there was no time to do this as the cut of cars was right on top of plaintiff at the time. Time for reaction would have to be allowed both engineer and brakeman who were on different tracks and, even if the signal had been given by the engineer, the brakeman could have done nothing more than he was doing. He had already applied the brakes so as to stop the cars for spotting at the elevator which was adjacent to the crossing. He brought the cars to a complete stop within about 23 feet 4 inches of the place where the accident occurred. Traveling at a speed of two miles an hour the cars could not have been stopped in less than from one and one-half to three car lengths. Plaintiff offered no proof as to the time when defendant became aware of plaintiff's position of peril in relation to the distance of the cars from the point where the accident took place. This is all important in invoking the doctrine of last clear chance. *Peters v. B. F. Transfer Co.*, 7 Ohio St. 2d 143 (1966), *supra*.

In ruling on the motion for a directed verdict, and considering the testimony in the most favorable light to the plaintiff, the District Judge said:

> "The evidence as to time is very conflicting, but again if we take that in the light that is most favorable to the plaintiff and make various computations in regard to the physical facts that are undisputed in the evidence, there was a minimum of time—in excess of thirty seconds—that the plaintiff was in a position of discovered peril. Now thirty seconds is in some view a very short time; in other places it is a very long time. An ordinary person can cover a lot of ground in thirty

> seconds if his mind is on it. A person using reasonable care and prudence, if faced with a dangerous situation, can do perhaps a great deal more than that. There were a number of things, I believe, that could have been done in that interval of time on the part of the Defendant to have avoided the accident and they were not done."

The record does not show that the engineer and brakeman had even thirty seconds but, assuming that they had, it was indeed a very short time for the engineer to have blown the whistle and for the brakeman to have acted and to have stopped the moving cut of cars before plaintiff was struck. As I have pointed out, the brakeman had already applied the brakes and did bring the cars to a stop within 23 feet 4 inches of the place where the accident occurred. He could have done no more than that.

On the other hand, it should be observed that the plaintiff had the *same* amount of time as did the engineer and brakeman to have averted the injury to herself and could have done so much easier either by not backing up or at least by taking a few steps forward in the space between the tracks.

The District Judge was correct in ruling out the issue of wanton misconduct which was injected in the case by plaintiff. There is great difficulty in even finding negligence on the part of defendant much less wanton misconduct which would deprive the defendant of the defense of contributory negligence. *Universal Concrete Pipe Co. v. Bassett*, 130 Ohio St. 567 (1936).

Sympathy for plaintiff's severe injury weighs heavily in her favor but cannot be considered in determining liability. Under Ohio law, plaintiff cannot recover. She ought not to recover in the federal court.

I would reverse the judgment.

APPENDIX B.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed July 31, 1968.)

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiffs-Appellees recover from Defendant-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.
CARL W. REUSS,
Clerk.

APPENDIX C.

ORDER DENYING PETITION FOR REHEARING.

Upon consideration, Appellant's petition for rehearing is hereby denied.

Chief Judge Weick dissenting.

Entered by order of the Court.
CARL W. REUSS,
Clerk.

APPENDIX D.

LETTER ORDER EXTENDING THE STAY OF MANDATE IN THE SIXTH CIRCUIT.

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Cincinnati, Ohio 45202

November 5, 1968

Mr. John W. Hackett, Jr.
811 Madison Avenue
Toledo, Ohio

Re: Diane Lones, et al vs. Detroit, Toledo & Ironton Railroad Company - No. 17, 912

Dear Mr. Hackett:

As requested, I presented to the Court your letter of October 30 concerning the stay of mandate in the above-entitled case. In response the Court suggests that I call your attention to Rule 41(b) which states in part that a stay of mandate "shall not exceed 30 days unless the period is extended for cause shown." Accordingly, the Court has extended the stay of mandate to and including November 30, 1968.

Yours very truly,
CARL W. REUSS

CWR: mml

CC: Mr. Donald P. Traci
1500 National City Bank Building
Cleveland, Ohio

APPENDIX E.

RELEVANT SECTIONS OF THE OHIO REVISED CODE.

§ 4501.01 Definitions.

As used in Chapters 4501., 4503., 4505., 4507., 4509., 4511., 4513., 4515., and 4517. of the Revised Code, and in the penal laws, except as otherwise provided:

(A) "Vehicles" means everything on wheels or runners, except vehicles operated exclusively on rails or tracks or from overhead electric trolley wires and vehicles belonging to any police department, municipal fire department, volunteer fire department, or salvage company, organized under the laws of this state or used by such department or company in the discharge of its functions.

* * * * *

§ 4511.62. Prohibition against driving across grade crossings. (GC § 6307-60)

No person shall drive a vehicle across a railroad grade crossing in the following instances:

(A) When a clearly visible electric or mechanical signal device gives warning of the immediate approach of a train;

(B) When a crossing gate is lowered;

(C) When a human flagman gives or continues to give a signal of the approach or passage of a train.

* * * * *